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IN THE

Supreme Court of the United States

..... TERM.

No. 569

DAVIES MOTORS INC. (a corporation),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Davies Motors Inc., by Duane R. Dills, its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case on November 12, 1929, confirming the decision of the United States District Court for the Southern District of California, Northern Division, and respectfully shows as follows:

1. The decision of the United States Circuit Court of Appeals in this case is not yet reported, but may be found in the record filed with this petition (R. 52).

2. This case brings up for decision by the United States Supreme Court the question which was expressly left open in *United States* v. *One Ford Coupe*, 272 U. S. 321; *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564, and *Commercial Credit Company* v. *United States*, 276 U. S. 226. The question presented in this petition for the consideration of this Court is whether or not it is mandatory under Section 26 of the National Prohibition Act, Title 2 (Chapter 85, Act Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40) that an automobile used to unlawfully transport intoxicating liquor be seized and proceeded against under said statute, or may such an automobile be proceeded against and forfeited under Section 3450 of the Revised Statutes (26 U. S. C. A., Sec. 1181) for the deposit and concealment of intoxicating liquor with intent to defraud the United States Government of taxes due thereon.

Statutes Involved.

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the per-

son arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the adver-

tisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

R. S., Sec. 3450, 26 U. S. C. A., Secs. 1181, 1182:

SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and

all grain or other material, suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors, which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

Facts.

The facts relative to the seizure of the automobile in question are given in Paragraphs II, IV and V of the findings of fact and conclusions of law by the District Court (R. 26 and R. 27) and read as follows:

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the same automobile as is the respondent in the above named libel;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of

Mexican Smuggled Whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; *that at the time of the arrest, the respondent vehicle was being used by said Mortensen for the purpose of transporting the liquor seized therein.* (Italics ours.)

V.

That on the 3rd day of October, 1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, California, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, *unlawfully possess and transport* Twelve (12) one-pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof. (Italics ours.)

It is found by the District Court upon stipulation of fact that your petitioner, Davies Motors, Inc., is an innocent lienor of the automobile in question, under conditional sale contract for an amount of $896.00.

On September 27, 1928, the said automobile was seized by the prohibition agent Mathias, and on October 3, 1928 an affidavit of complaint (Exhibit A, R. 18) was filed by the said prohibition agent Mathias against one Mortensen, the driver of the automobile, for "willfully, wrongfully and unlawfully possessing and transporting twelve one-pint bottles of intoxicating liquor", and a warrant was issued for said offense by the United States Commissioner, and the said Mortensen was arrested under said warrant (See Exhibits B and C, R. 19 and R. 20). On November 19, 1928, an information was filed against the said Mortensen, charging him with violation of Section 3450 of the Revised Statutes, and on November 21, 1928, the said Mortensen was arraigned upon the said charge and pleaded guilty, and was fined $250. (See paragraphs V, Stipulation of Facts, R. 22). On January 2, 1929, a libel was filed against the said automobile, in which it was alleged that the said Mortensen, the driver, had concealed and deposited five pints of distilled spirits upon which there was then due certain taxes imposed by the Act of November 23, 1921, known as the Willis Campbell Act and the Revenue Act of 1921 (See Libel, Count I, R. 3-4). Your petitioner filed a complaint of intervention (R. 7) and respectfully showed that the said Mortensen at the time of his arrest and the confiscation of said automobile was transporting in said automobile five pints of intoxicating liquor in violation of the National Prohibition Act. The Court concluded as a matter of law that the said automobile should be forfeited for violation of Section 3450 of the Revised Statutes, (See Conclusions of Law, Paragraph I, R. 30), and entered a decree on June 20, 1929, ordering the said automobile to be condemned and forfeited to the United States. (See Decree, R. 30-31.)

Specifications of Error.

The assignments of error relied upon by your petitioner in the appeal to the Circuit Court, and which will be urged before this Court, were as follows (R. 35-36):

I.

That the Honorable Court erred in its conclusions of law, in that it concluded that the respondent automobile herein should be forfeited to the United States of America for a violation of the provisions of Section 3450 Revised Statutes.

II.

That the Honorable Court herein erred in that in its conclusions of law it concluded that the United States of America should recover from the intervener-claimant, Davies Motors, Inc., its costs of suit herein incurred and its storage and warehouse charges incurred since the date of seizure.

III.

That the Honorable Court erred in its decree entered herein in this, that said decree ordered, adjudged and decreed that the judgment be for the libelant and that the respondent automobile be declared forfeited to the libelant and that said libelant recover its costs of action for storage charges from the intervener and that said decree and all thereof was contrary to law and should have been rendered in favor of Davies Motors, Inc., the intervener, dismissing said libel and said respondent automobile, and ordering said respondent automobile released to the intervener free from all claim of the libelant.

The point involved in this case has been argued before this Court by the counsel for your petitioner in several other cases, but has not been decided. Members of this Court have said that the question still remains open because in the previous cases decided by this Court either the pleadings or the specific facts in the cases did not necessitate a decision on this specific question. Discussions of the question in the cases argued by counsel for your petitioner may be found in:

United States v. *One Ford Coupe*, 272 U. S. 321;
Port Gardner Investment Company v. *United States*, 272 U. S. 564;
Commercial Credit Company v. *United States*, 276 U. S. 226.

Conflict With Decisions of Other Circuit Courts.

1. The decision by the Ninth Circuit Court of Appeals in this case is in harmony with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Richbourg Motor Company* v. *United States*, 34 Fed. (2) 38, but is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *United States* v. *General Motors Acceptance Corporation*, 25 Fed. (2) 238, and of the United States Circuit Court of Appeals for the Second Circuit in *Commercial Credit Corporation* v. *United States*, 18 Fed. (2) 927. The point upon which these circuits are in conflict is whether or not the provisions of Section 26 of the National Prohibition Act are mandatory in requiring forfeiture proceedings to be brought under the provisions of that act against an automobile used to transport intoxicating liquor, or whether

the United States District Attorneys may elect to proceed against such automobiles under Section 3450 of the Revised Statutes for the deposit and concealment of intoxicating liquor with intent to defraud the United States of a tax thereon. The Fourth and the Ninth Circuits have both decided that the Government may elect to proceed under Section 3450 Revised Statutes without regard to the provisions of Section 26 of the National Prohibition Act. The Second Circuit Court of Appeals, in speaking of Section 3450 and Section 26, said:

> "In these circumstances, we believe there is a direct conflict between the two sections in question, and that Section 26 must control the disposition of the vehicle."
>
> (*Commercial Credit Corp.* v. *United States*, 18 Fed. (2) 927, at p. 930.)

and the Fifth Circuit Court of Appeals said:

> "Under such circumstances it is apparently recognized in United States *v.* One Ford Coupe, 272 U. S. 321, that Section 26 is exclusively applicable."
>
> (*United States* v. *General Motors Acceptance Corporation*, 25 Fed. (2) 238, at 239.)

The District Courts throughout the United States are in hopeless conflict as to the law applicable under the circumstances.

Importance of Case and Necessity for Granting Writ.

1. This Court has recognized the importance of the law involved in this case, as it has granted petitions filed by counsel for your petitioner in similar cases, and has re-

cently, December 2, 1929, granted a writ of certiorari to the Fourth Circuit Court of Appeals in *Richbourg Motor Company* v. *United States,* involving similar specifications of error. (See U. S. Supreme Court Advance Opinions, 1929 Term, p. 130.) The pleadings in this case present even more clearly than does the *Richbourg Motor* case the question to be decided by this Court.

The answer of your petitioner to the libel in this case specifically raises the question in paragraphs 7 and 8 of the complaint in intervention (See Record 9 and 10).

It is respectfully urged that writ of certiorari should be immediately granted in this case, so that it might be heard at the same time or previous to a consideration of the *Richbourg Motor* case now before this Court.

2. This Court appreciates the great loss of money and inconvenience being caused to the automobile industry and the great annoyance being caused to the Government because of the confusion that exists in the various District and Circuit Courts respecting the law applicable, and it is respectfully urged that this Court grant this petition in order to clarify the law on the subject.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, to the end that this case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals in this case may be reviewed and reversed; and that your petitioner may have such other and further relief and

remedy in the premises as to this Court may seem appropriate and just, and thus your petitioner will ever pray.

DAVIES MOTORS INC.

By DUANE R. DILLS,
Counsel for the Petitioner.

DEFORREST HOME,
CHARLES W. HASWELL,
Of Counsel.

I certify that in my opinion the foregoing petition is well founded in point of law. It is not filed for delay.

DUANE R. DILLS.

January, 1930.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

No opinion other than the findings of fact and conclusions of law, which may be found in the record, pages 25-30, was rendered by the United States District Court, Southern District of California, Northern Division. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in this case may also be found in the record (R. S. Z.), since the said decision has not yet been reported in the published law reports, or the said decision may also be found in the United States Daily of December 11, 1929, page 6, IV U. S. Daily 2694.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on November 12, 1929 (R. 61...). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, 28 U. S. C. A., Sec. 347(a).

Argument.

It will serve no useful purpose to cite all the cases on the subject, as most of them have been referred to and were considered by this Court in its decisions in *United States* v. *One Ford Coupe,* 272 U. S. 321; *Port Gardner Investment Company* v. *United States,* 272 U. S. 564; *Commercial Credit Company* v. *United States,* 276 U. S. 226, and in the petition for writ of certiorari which was granted December 2, 1929, in *Richbourg Motor Company* v. *United States,*

United States Supreme Court Advance Opinions, 1929 Term, page 130.

If a writ of certiorari should be granted in this case, your petitioner will then immediately move to have it considered at or before the time the *Richbourg* case is heard, so that this Court may dispose of the question at the same time.

It is respectfully submitted that the relief prayed for by the petitioner in this case should be granted and a writ of certiorari issued, directed to the Ninth Circuit Court of Appeals, so that the matter might finally be determined by this Court.

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DEFORREST HOME,
CHARLES W. HASWELL,
Of Counsel.